UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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| CATHY J. RADCLIFFE,<br>Appellant,<br><br>v.<br><br>DEPARTMENT OF TRANSPORTATION,<br>Agency. | DOCKET NUMBER<br>BN07529200321I1<br><br><br><br>DATE: APR 2 1 1993 |

William J. Lafferty and Sean Lafferty, Esquires, Lafferty & Lafferty, Boston, Massachusetts, for the appellant.

John R. Donnelly, Esquire, Burlington, Massachusetts, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

## OPINION AND ORDER

The agency petitions for review and the appellant cross petitions for review of the initial decision, issued March 20, 1992, which mitigated the agency's action removing the appellant from the position of Air Traffic Control Specialist (ATCS) to a demotion to the position of Flight Service Specialist (FSS). After full consideration,[1] for the reasons

[1] In adjudicating this appeal, we have not considered submissions filed after the close of the record because there is no showing that they were based on evidence not readily available before the record closed. See 5

below, the Board GRANTS the agency's petition for review, DENIES the appellant's cross petition for review, AFFIRMS the initial decision as MODIFIED by this Opinion and Order, and SUSTAINS the agency's removal action.

BACKGROUND

By letter dated September 5, 1991, the agency informed the appellant that she would be removed, effective October 5, 1991, because of her failure to complete the training requirements for the ATCS position. Initial Appeal File (IAF), Tab 4, Subtab 4a2. Specifically, the appellant had not progressed satisfactorily in Phase VIIIA, Non-Radar, of the training program because she had not made specific, required improvements after notification, on July 8, 1991, of her unsatisfactory progress in that phase.[2] IAF, Tab 4, Subtabs 4a5, 4b3. In her timely appeal to the Board's Boston Regional

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C.F.R. § 1201.114(i); *Forma v. Department of Justice*, MSPB Docket No. SF07529203361I1, slip op. at 8 (April 19, 1993). We note specifically that the appellant's submission (filed November 17, 1992) of the agency's June 25, 1992 check appears, on its face, to have been unavailable before the record closed. Petition for Review (PFR) File, Tab 21. We do not accept this late-filed submission, however, in the absence of timely evidence that the appellant was unaware, before the record closed, of how the agency was calculating her pay, i.e., apparently deducting for the appellant's outside earnings.

[2] On April 18, 1991, the appellant was notified that, although she had received a memorandum terminating her training because of unsatisfactory performance, she would be "recycled" for training because of procedural inconsistencies in the administration of her program. IAF, Tab 4, Subtab 4c2. We note that the termination notice above refers to the appellant's performance after repeating the Phase VIII training cycle.

Office,[3] the appellant contended that she should not have been assigned to the agency's Boston Center because "her Academy score [was] below the standard for the Center trainees," her training was inadequate, and the penalty of removal was too severe. IAF, Tab 1.

Following a hearing, the administrative judge mitigated the removal and ordered the agency to demote the appellant to an FSS position. The administrative judge initially determined that the agency action was properly taken under 5 U.S.C. Chapter 75. Initial Decision (ID) at 2. He next found without merit the appellant's claim that she should not have been placed for training at the Boston Air Traffic Control Center (BATCC) because of her low training score at the Federal Aviation Administration (FAA) Academy in Oklahoma City, where she received her initial training.[4] ID at 4-5. The administrative judge also rejected the appellant's claim that her performance deficiencies were related to inadequate training, specifically finding that the agency met its burden in this regard. ID at 6-10. Because he found that the agency provided the appellant with adequate and effective training, the administrative judge also concluded that the agency had

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[3] The appeal was transferred to, and adjudicated by, the Board's St. Louis Regional Office.

[4] Specifically, the administrative judge rejected as irrelevant the appellant's assertion that she was "programmed" to fail at the BATCC. Because the appellant had graduated from the FAA training academy with a passing screen score of 72.31, and because Federal agencies have relatively unfettered discretion to assign new employees, the administrative judge found that the appellant was properly placed at the BATCC.

not committed a prohibited personnel practice under 5 U.S.C. § 2302(b)(11), as the appellant claimed. ID at 10.

The administrative judge found that, although disciplinary action was warranted to promote the efficiency of the service, demotion was the maximum reasonable penalty for the following reasons: (1) FAA Order 3330.30B provided that failed ATCS developmentals may be assigned to other positions within the agency; (2) the appellant's failure in the ATCS training program was not an accurate predictor as to success in an FSS position; (3) testimony indicated that the appellant was qualified to be an FSS based on her screen score at the FAA Academy; (4) her supervisor at the time the appellant was terminated from training recommended her for placement in an FSS position; and (5) the agency customarily placed developmentals such as the appellant in FSS positions. ID at 11-12.

## ANALYSIS

### The agency's petition for review

In its timely petition for review, the agency argues that the administrative judge abused his discretionary authority in mitigating its removal penalty. The agency asserts that the administrative judge erred when he relied on the cancelled agency Order 3330.30B, which had not been entered into the record. The agency maintains that DOT/FAA Order 3330.30C allows reassignment of a failed developmental controller contingent upon certain conditions not met in the appellant's case. Specifically, the agency argues that the appellant

could not be retained because the facility manager did not recommend her retention and, in any event, there were no FSS vacancies available. In addition, the agency asserts that the appellant's supervisor's reference should not have been considered because he was not qualified to recommend her for an FSS position. Finally, the agency argues that, under these circumstances, where the appellant failed a training stage of an "up-or-out" program, an administrative judge is precluded from usurping the managerial authority of the agency. Petition for Review (PFR) File, Tab 1. The appellant has filed a response.[5] PFR File, Tab 4.

Generally, the Board will review an agency-imposed penalty to determine if the agency considered all the relevant

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[5] The appellant has moved to dismiss the agency's petition for review for failure to provide interim relief. The agency, however, has submitted evidence that it complied with the administrative judge's interim relief order and provided the pay and benefits of the appellant's former position. We find no merit in the appellant's assertion that the agency has not properly effected the interim relief order "because it did not reinstate her into the Flight Service occupation nor determine that her return would be unduly disruptive to the work environment." PFR File, Tab 7. In view of the appellant's failure to proceed past training phase VIII, we find reasonable the agency's decision to assign the appellant to an ATCS position with restricted duties. We thus have determined that the appellant has not made a prima facie showing of bad faith under the circumstances here. Since we find that the agency properly effected interim relief, we deny the appellant's motion to dismiss the petition for review. *See Jeffries v. Department of the Air Force*, 53 M.S.P.R. 35, 40 (1992). We note as well that the ATCS position to which the agency assigned the appellant was at a higher grade than the FSS job which the administrative judge awarded her; because the appellant has made no argument that if she had been placed in an FSS job, she would have been entitled to the paid lunch and differential pay that she claims she previously received, her claims in this regard cannot be sustained.

factors and exercised management discretion within tolerable limits of reasonableness. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). The Board has not previously answered the question of whether the *Douglas* mitigation analysis applies where the agency has taken a removal action after the employee failed to progress satisfactorily in an "up-or-out" training program, however. *See Hutchcraft v. Department of Transportation*, 55 M.S.P.R. 138, 147 (1992); *Pawlak v. Department of Transportation*, 40 M.S.P.R. 546, 554 (1989)(remand of case was warranted for consideration of whether the Board had authority to mitigate removal penalty imposed pursuant to "up-or-out" training program). We do so now.

In *Griffin v. Defense Mapping Agency*, 864 F.2d 1579, 1581 (Fed. Cir. 1989), the Federal Circuit held that, where a security clearance is a condition of employment, an employee has lost that clearance, and there is no agency policy of reassigning employees who unsuccessfully seek security clearances to nonsensitive positions, the Board has no authority to inquire into the feasibility of a transfer to an alternative position. *Griffin* at 1581; *Lyles v. Department of the Army*, 864 F.2d 1581, 1583 (Fed. Cir. 1989). Similarly, we find that, where the satisfactory completion of training is a condition of employment, as it is here, and there is no agency policy manifested by regulation obligating reassignment, the Board has no authority to determine whether reassignment or a lesser penalty would be appropriate under the *Douglas* factors.

Consequently, we find reasonable, and well within the agency's authority, the removal of an employee who has to progress satisfactorily to the next stage of a training program as a condition of his employment and fails to do so. We further find here, however, that since the FAA had an existing policy regarding reassignment for failed developmentals, it was appropriate for the administrative judge to review whether the agency properly had applied its existing policy regarding reassignment.

We note that the administrative judge referenced FAA Order 3330.30B, which provided that failed ATCS developmentals could be assigned to other positions within the agency. That order, established in 1971, was cancelled and replaced by FAA Order 3330.30C, dated September 27, 1984. See IAF, Tab 4, Subtab 4f. FAA Order 3330.30C provides that the basic premise of the 1971 order remains, i.e., "failure to progress successfully in the training program may be the basis for separation from the occupation." *Id.* at paragraph 5. FAA Order 3330.30C also expressly provides that exceptions to separation from the ATCS occupation are permitted for developmentals who show potential for work at the full-performance level in different facilities if general criteria are met. *Id.* at paragraph 8(c).

The general criteria for a position change include a recommendation by the manager of the "losing facility" and a suitable available vacancy. *Id.* at paragraph 8(c)(1). The record simply contains no recommendation by the manager of the

losing facility. Although the administrative judge found it significant that the appellant's training supervisor recommended (to the Facility Manager) that the appellant be considered for reassignment, we find that this recommendation did not constitute the requisite recommendation by a facility manager.[6] *See* IAF, Tab 4, Subtab 4b2. More importantly, there was no obligation by the agency to find another job for the appellant. Consequently, we need not reach the question of whether there was a suitable available vacancy since there was no requirement that the agency find another job for failed developmentals such as the appellant. *See Griffin*, 864 F. 2d at 1581. In the absence of any duty to find alternative employment for an employee who has failed an "up-or-out" training program, we find that the Board may not mitigate the agency's removal penalty. *Id.* at 1581. We, therefore, conclude that the administrative judge erred in determining that demotion to an FSS position was the maximum reasonable penalty which the agency should have accorded the appellant.

The appellant's cross petition for review

The appellant has filed a cross petition for review in which she contends that the administrative judge's "inattention and respectfully, his inability to preside over

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[6] We note, also, that the administrative judge's finding that positions historically have been found for the vast majority of individuals who are terminated from en route ATCS training is not supported by the record -- the record shows only that, in some cases, the BATCC facility manager recommended that the agency reassign some individuals who had failed a training phase. IAF, Tab 44.

the proceedings, adversely affected the appellant's substantive right to a fair hearing."[7] Cross PFR at 28. In this vein, she claims that "the prehearing process was chaotic," and she objects to the administrative judge's decisions regarding her discovery requests. *Id.* Our review of the record does not support the claim that the administrative judge abused his authority during the adjudicatory process. Rather, our review reveals that the administrative judge considered the appellant's many submissions and requests, and memorialized his decisions. E.g., IAF, Tab 35. We therefore find no basis for the appellant's claim that the administrative judge handled the prehearing process in a chaotic manner. Neither does our review support the appellant's related claim that the administrative judge abused his discretion in regard to the discovery process. In this connection, we note that in matters of discovery, administrative judges have broad authority. *See Bayne v. Department of Energy*, 34 M.S.P.R. 439, 443 (1987), *aff'd*, 848 F.2d 1244 (Fed. Cir. 1988) (Table).

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[7] The appellant specifically notes that she is not claiming that the administrative judge was biased but that the administrative judge "failed to properly exercise his discretion," for example, in regard to ruling on motions and enforcing orders. Cross petition for review at 28. Although the appellant also contends that the administrative judge improperly excluded evidence regarding the training procedures, we find that he properly excluded such evidence as irrelevant and thus that there is no showing of prejudicial error in this respect. *See* ID at 5.

In her cross petition, the appellant again asserts that the agency's charge should not be sustained and reiterates her claims regarding the agency's alleged improper reliance on her first training failure and its alleged failure to provide her with the established training course or an opportunity to improve. Because these arguments amount to mere disagreement with the administrative judge's findings in this regard, we find that the appellant's cross petition does not warrant review under 5 C.F.R. § 1201.115, and we will not address her arguments here, in the absence of a showing of error by the administrative judge. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

## ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

## NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C.

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.